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April 4, 2003

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APR - 4 2003

VIA HAND DELIVERY

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

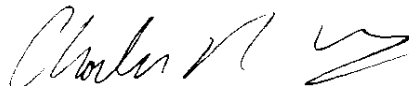
**Re: Alascom, Inc. - WC Docket No. 03-18 - Control No. 2003-208
Supplement to Waiver Request
Supplement to Response to FOIA Request**

Dear Ms. Dortch:

On behalf of Alascom, Inc., enclosed are an original and four copies of its Supplement to Waiver Request; Supplement to Response to FOIA Request in the above-referenced proceedings. Pursuant to a request of the Commission's staff earlier today we provided a copy of this submission to the Commission's staff and the other party to this proceeding via e-mail.

Very truly yours,

HOLLAND & KNIGHT LLP



Charles R. Naftalin

Holly R. Smith

Counsel for Alascom, Inc.

Enclosure

WAS1 #1172538 v1

04/04

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Alascom, Inc. Request for)	WC Docket No. 03-18
Waiver of Commission Rule)	
And Orders Requiring Annual)	
Tariff Revision; and)	
Freedom of Information Act Request)	Control No. 2003-208

**SUPPLEMENT TO WAIVER REQUEST;
SUPPLEMENT TO RESPONSE TO FOIA REQUEST**

I. Introduction.

On Wednesday, March 26, 2003, the Commission's staff, representatives of General Communication, Inc. ("GCI"), and representatives of Alascom, Inc. ("Alascom") participated in a conference call to discuss GCI's FOIA request and Alascom's request for a year 2002 waiver of the requirement of an annual revision of its Tariff No. 11. At the conclusion of the call, the staff asked Alascom to supplement the record by articulating why the initial 1994-1995 data entered into the CAP should not be provided to GCI and to provide a citation to a D.C. Circuit Court of Appeals decision that Alascom relied upon during the call, which stands for the proposition that the Commission must determine whether the required release of competitively sensitive information is justified even if under a protective order

The record already before the Commission demonstrates the following.

Release of the CAP model and data would be competitively harmful. GCI and Alascom have almost equivalent market shares, which demonstrates GCI's strength

and Alascom's lack of market power. The Alascom data would offer GCI the opportunity to target its marketing toward specific, lucrative private line customers and to guide its network investments in geographic and service competition with Alascom.

Since 1996, GCI has expanded the scope of its facilities-based competition with Alascom, as shown by its entry into 50 Bush communities, substantial growth in market share, and in the breadth of its competition, for example provision of cable television and Internet services.

- The CAP breaks the Alascom system into approximately 900 "CLOCs" that generally designate a specific geographic area, but are also used to identify specific facilities or functional categories of expenditure.¹ For each of these CLOCs, the CAP develops detailed information on gross and net facilities investment, expenses, and backbone transmission facilities. We are unaware of another cost model that contains information at this level of detail, particularly on investment and expenses. *See Declaration* at ¶ 4.
- If permitted to view the initial model and inputs, GCI could assess with relative accuracy comparative market shares at location-specific levels of detail, and to make very reliable estimates of Alascom's costs of service for these same locations. *See Declaration* at ¶ 5.
- If multiple years of data were disclosed to GCI, GCI would be able to gain information about changes in the nature and mix of Alascom's business, and it would provide them with a way of evaluating how effective its competitive offerings were at cutting into Alascom's market share in specific geographic areas. *See id.*
- GCI bases its argument, that the CAP and CAP data should be released, in part on the fact that the CAP includes hard-coded inputs. The CAP has had hard-codes included in its functions since its very beginnings. The FCC was aware of and approved the use of hard-codes when it approved the CAP in 1995. Moreover, the Common Carrier Bureau ordered in 1997,

¹ A CLOC is defined as a cost location code. These codes were originally designed and maintained by Pacific Telecom, Inc. ("PTI") to track Alascom's investment and expenses by geographic location or function in the normal course of business. A CLOC is a more granular reporting level than a wire center, customarily called a CLLI code.

that more factors be held constant.² Specifically, that year, the Bureau froze the distinction between Bush and non-Bush locations in the model. The inclusion of hard-coded data was not reason enough for the Commission to release the CAP Model and data in 1996, nor is it any more compelling a reason now.

Alascom's CAP model contains a significant amount of competitively sensitive information for non-Bush locations for which the FCC has concluded that Alascom is a nondominant carrier. Some of the competitively sensitive information includes: backbone transmission facilities, network demand, for example, T-1 equivalents for private lines and for switched lines, customer and operator service calls, the cost of participation in named sales promotions and media advertising expenses. *See Declaration* at ¶ 6.

Providing GCI access to the CAP model (with the underlying data) not only would provide it with the kind of competitively sensitive information noted above about Alascom's costs in Bush locations that lack facilities-based competition, it also would provide detailed cost and demand information in non-Bush areas and Bush areas where there is substantial competition between Alascom, GCI and other

² The FCC Staff made a significant change in the concept underlying the CAP when it "froze" the locations that are defined as Bush locations -- regardless of the actual competitive circumstances now faced by Alascom at individual locations. *See Alascom, Inc., Cost Allocation Plan for the Separation of Bush and non-Bush Costs*, Memorandum Opinion and Order Approving Cost Allocation Plan, 12 FCC Red 1991 (1997) at ¶¶ 25-27. The Commission has not responded to the Alascom Application for Review of that order, pending service in 1997. Thus, despite that competitive services are offered to some areas originally classified as Bush, such areas remain classified as Bush locations, which is entirely contrary to the market structure ordered in CC Docket No. 83-1376. Alascom's Application for review of that decision has been pending for more than five years. *See Alascom, Inc., Cost Allocation Plan for the Separation of Bush and non-Bush Costs*, File No. AAD 94-119, Application for Review (filed March 12, 1997). Similarly, the FCC has not responded to Alascom's Petition for Elimination of Conditions, filed more than three years ago. It would be grossly unfair to force Alascom to turn over such competitively-sensitive data when the FCC has steadfastly refused to substantively address Alascom's evidence that the regulatory purpose which led to the CAP in the first place no longer exists.

telecommunications providers. This would put Alascom at a significant competitive disadvantage, because GCI would have one-way access to Alascom's costs, network and demand at a very granular level of detail.

In addition to the points noted above, previously made to the Commission, Alascom's consultants have prepared a new statement to address the staffs questions from last week and to provide specific examples of the kind of information which should not be provided to GCI. In the attached statement, they prove the following

- The CAP model contains the total number of interstate and intrastate private lines within each of the 33 non-Bush locations and the total for Alascom. In addition to providing information about Alascom's business and residential customers in non-Bush locations, access to the CAP provides GCI information on the potential markets within Bush locations that could assist it in making strategic entry decisions. (Bush/non-Bush Allocation portion of the model, CAP1101 after macro.123 at Network Demand tab, column J).
- The CAP model contains specific information regarding the location of Alascom's network facilities (for example, competitively sensitive information regarding the location of and relationship between Alascom's earth station terminating repeaters, microwave repeater, and microwave terminating repeaters, *e.g.*, the Backbone Transmission Table) would permit GCI to develop refined estimates of how – from a network perspective – Alascom actually serves various customer locations and, thus, to estimate the costs (Bush/non-Bush Allocation portion of the model, CAP1101 after macro.123 at Backbone tab).
- The CAP model contains investment and expense data at each and every location where any significant piece of equipment is located across Alascom's complete network. For example, the CAP model contains investment and expense information on the earth station terminal end point located in Takotna, a microwave terminal repeater in Tea Lake and a fiber spur terminal repeater for Moose Pass. (Bush/non-Bush Allocation portion of the model, CAP1101 after macro.123 at Part 32 Account tab).

- The CAP model contains information on the number of transponder channels used to serve each of Alascom's bush and non-Bush locations. (Bush/non-Bush Allocation portion of the model, CAP1101 after macro.123 at Gateway tab). At a minimum, this would provide competitors with some sense of call volume to various locations, and could be used as an important input to the development of any number of potentially useful cost estimates.
- The CAP model contains information on the number of all customer service and operator service calls during each subject time period for each of the 33 non-Bush locations and the total for Alascom. (Bush/non-Bush Allocation portion of the model, CAP1101 after macro.123 at Cust Service and Operator Service tabs).

II. The CAP Data Is Confidential And Cannot Be Released Pursuant to Exemption 4, and FCC and D.C. Court of Appeals Precedent.

The Commission cannot release the CAP data because the model and data are commercial information "obtained from a person and privileged and confidential."³ The Commission already ruled on an identical FOIA request made by GCI and determined that the requested information is confidential under Exemption 4:

These documents contain specific cost and demand data that is highly detailed and disaggregated. If this information were disclosed, GCI would know with a high degree of specificity the costs and demand for various sites within the non-Bush areas where GCI competes with Alascom. This information could also be used to determine profit margins when combined with information about Alascom's rates, which is contained in the public tariffs.⁴

³ 5 U.S.C. § 552(b)(4).

⁴ Memorandum Opinion & Order, *In re General Communication, Inc., on Requests for Inspection of Records*, 11 FCC Rcd. 17143, FCC 96-191, ¶ 5 (rel. April 30, 1996). The Commission relied on Exemption 4 of FOIA which permits withholding of "commercial or financial information obtained from a person and privileged and confidential." 5 U.S.C. § 552(b)(4). The Commission stated that: "Under the 'competitive harm' test of Exemption 4, an agency may withhold from disclosure

That FCC statement holds as true today. The CAP data is proprietary and not releasable under exemption 4 because: (1) the type of information is unique to Alascom and is not ordinarily disclosed to the Commission or any party; and (2) GCI could use the **CAP** data to competitively discriminate against Alascom.

Access to 1994-1995 data, in combination with publicly available information provided with each of the annual Tariff No. 11 rate revisions from 1995 through 2001, would allow GCI to assess comparative market shares at location-specific levels of detail, and could be used to produce reliable projected estimates of Alascom's costs in the years after 1995. The closer in time the data, the more reliable the projected estimates of Alascom's costs. In addition, if GCI is allowed to compare 1994-1995 inputs with more current ones, GCI could assess how effective its past competitive offerings were in specific geographic areas, and how to shape its future competitive offerings in order to target Alascom's market share in specific geographic areas. Moreover, GCI would have access to the number of private line customers that Alascom has maintained in each of the 33 non-Bush locations. This creates a business opportunity for GCI to gain additional marketshare by having access to information that its competitor does not have about its customers.

III. GCI Has Failed to Justify Its Position.

Prior to, and again during, the conference call, Alascom offered to provide appropriate representatives of GCI access to the CAP Model in the offices of Alascom's counsel. Subject to a protective order previously used before the

confidential or privileged commercial or financial information obtained from a person if the party seeking confidentiality demonstrates both actual competition and the likelihood of substantial competitive injury if disclosure is made." FCC 96-191, at ¶ 4 (citations omitted).

Commission, counsel and consultants not making or offering routine business advice to GCI could examine the CAP model to determine its processes, the effects of so-called "hard-coding" and its operations, exactly what GCI claims it seeks (*see* GCI Opposition in WB Docket No. 03-18 at p. 21 (filed February 5, 2003)). GCI not only declined that invitation summarily, its representatives urged that all of Alascom's data, including the most current data, be provided. GCI also objected to restricting access to the CAP to non-business related personnel, under a standard form of protective order

That extreme position shows GCI's true intentions. The issue before the Commission is a request for waiver of one, single tariff transmittal under Alascom's Tariff No. 11. GCI wants competitive advantage far beyond the highly restricted requirements it purports to need in the context of Alascom's limited request for waiver. GCI has not even attempted to explain why access to the CAP model, combined with the substantial, but aggregated, information provided in every Tariff No. 11 annual revision is not sufficient for its opposition to a single waiver request. GCI has not offered any justification for its rejection of entering into a reasonable protective order which would permit an analysis of the CAP. In light of such unreasonable conduct, its current claims should be discounted.

Based upon such an unwarranted position, it comes with little surprise that by a letter dated April 1, 2003, GCI substantially misrepresented the discussion which took place during the March 26, 2003 conference call by expressing "concern regarding the manner in which Alascom ... has responded to the Commission's

request for information." In the letter, GCI mischaracterized the understanding the staff reached during the March 26th conference call regarding what information Alascom would provide to staff and when. On April 2, 2003, the FCC asked Alascom (1) to identify by date all sets of data that were used by Alascom and its consultants in the analysis that was submitted in support of the waiver request; (2) identify which, if any, of the identified data sets it contended were competitively sensitive, by data set, along with an explanation and legal support for that contention; and (3) explain why, despite the passage of time, Alascom contends that the 1994-1995 data remains competitively sensitive.

As shown above, all data used in the Tariff No. 11 rate making process is sensitive, should not be released by the Commission, and Alascom will not agree to volunteer it. The Commission will protect tariff support data from disclosure, even under a protective order, in unusual cases. The CAP is unique before the FCC, and therefore, it is exactly one of "the rarest of instances" that warrants full confidentiality of tariff cost support data, without disclosure under a protective order. *See In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Memorandum, Opinion and Order, 14 FCC Rcd 20,128 at ¶ 2 (1999). "We are unaware of another cost model that contains information at this level of detail, particularly on investment and expenses." *See Declaration* at ¶ 4 The CAP and its data are rare indeed.

Moreover, Alascom submits that the CAP data are analogous to raw audit data, which are presumed to be exempt from disclosure. *See In the Matter of*

Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order, 13 FCC Rcd 24,816 at ¶¶ 1, 53 (1998). ("We have only rarely departed from the general policy of withholding audit information from public disclosure.") See also *Qwest Communications International, Inc. v. FCC*, 229 F.3d 1172, 1183 (D.C. Cir. 2000).

The audit data protected by the court in *Qwest* is analogous to the information requested by GCI because it was gathered for the purpose of maintaining detailed accounting records, serving various regulatory functions including the setting of rates. See *Qwest*, 229 F.3d at 325. As GCI and the FCC are aware, the highly detailed data used in the Alascom CAP is for setting rates.

Should the Commission believe otherwise, we note that reliance on a protective order does not eliminate the Commission's obligation to adequately justify a required release of information. See *Qwest*, 229 F.3d at 1183. The court found that the Commission should not require disclosure of the information unless it found that the data at issue were not highly commercially sensitive, or release of the data would not adversely affect the Qwest's competitive position, and that such release is justified by significant public interest factors. See *id.*

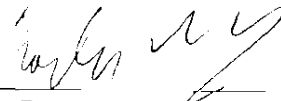
IV. Conclusion.

All CAP data, including 1994-1995 data, is highly sensitive, and based upon Commission and Court precedent, and should not be released, even under protective order. Independent experts have submitted ample explanation and specific examples of the competitive harms that likely would occur if any of the data are

released to GCI. Therefore, the Commission should reject GCI's FOIA request and not otherwise require Alascom to provide its CAP information to GCI.

Respectfully submitted

ALASCOM, INC.

By 
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April 4, 2003

WAS1 #1172366 v4

DECLARATION OF

JOHN C. KLICK

AND

JULIE A. MURPHY

1. We are John C. Klick and Julie A. Murphy. We filed a Declaration in support of the Petition for Waiver filed by Alascom, Inc. (“Alascom”) on January 7, 2003 (“Waiver Declaration”) and a Reply Declaration on March 5, 2003 to respond to certain allegations made in *General Communication, Inc. Opposition to Petition /Or Waiver* (“GCI Opposition”) that was filed on February 5, 2002, and to the *Statement of John Leahy* that was attached as Exhibit 3 to the CCI Opposition. In addition, we submitted a Declaration in support of Alascom’s Opposition to GCI’s FOIA request on March 13, 2003. (“**FOIA** Declaration”)
2. The purpose of this Declaration is to respond to questions raised by the FCC Staff during recent conversations with GCI and counsel for Alascom regarding the Alascom-specific data that we relied upon in support of Alascom’s waiver, and to identify competitively sensitive information that is contained within the CAP model.
3. First, Alascom was asked to identify by date all sets of data that were used by Alascom and its consultants in the analysis that was submitted in support of the waiver request. Our Waiver Declaration relied upon two versions of the CAP model. First, we relied upon certain portions of the 1998 CAP Model (which was used to develop the 1999 Tariff 11 rates). Our Waiver Declaration, filed in

support of Alascom's Petition for Waiver, relied upon the portion of this model that develops the Bush/non-Bush allocation. Our Waiver Declaration also relied upon the 2001 CAP Model (which was used to develop 2002 rates). We reviewed the entire model, including the Bush/non-Bush allocation, separations model and revenue requirement development portions.

4. The FCC Staff's second request asked Alascom to identify which, if any, of the identified data sets it contended were competitively sensitive, by data set, along with an explanation and legal support for that contention. This is a difficult task because it assumes we can successfully predict all of the uses to which a competitor, such as GCI, could put the detailed information that exists within the CAP. This is not realistic – and it is one reason that we noted, in our FOIA Declaration that to our knowledge the CAP requires information from Alascom at a finer level of detail than is required by any other telecommunications cost model. FOIA Declaration at ¶ 4. Armed with the information sought by its FOIA, GCI would be able to (1) develop detailed cost estimates for each of Alascom's locations using the current CAP assumptions, (2) alter the CAP assumptions to evaluate the effects on Alascom's costs of making alternative assumptions, and (3) get a very good feel for the actual volume of call activity at various locations. One can hardly imagine information more valuable to a competitor.
5. As a threshold matter, providing GCI access to the CAP model (with the underlying data) not only would provide it with competitively sensitive information about Alascom's costs in Bush locations where GCI does not

currently provide service, it also would provide it with detailed cost and demand information in non-Bush areas and Bush areas where there is substantial competition between Alascom, GCI and other telecommunications providers. This would put Alascom at a significant competitive disadvantage, because its competitors would have unfettered access to competitively sensitive information on Alascom's cost, network and demand at a very granular level of detail, while being deprived of comparable information from its competitors. The following is a list of some of the competitively sensitive information that we have identified within the CAP model

- The CAP model contains the total number of interstate and intrastate private lines within each of the 33 non-Bush locations and the total for Alascom. In addition to providing information about Alascom's business and residential customers in non-Bush locations, access to the CAP provides GCI information on the potential markets within Bush locations that could assist it in making strategic entry decisions. (Bush/non-Bush Allocation portion of the model, CAP1101 after macro.123 at Network Demand tab, column J).
- The CAP model contains specific information regarding the location of Alascom's network facilities (for example, competitively sensitive information regarding the location of and relationship between Alascom's earth station terminating repeaters, microwave repeater, and microwave terminating repeaters, e.g., the Backbone Transmission Table) would permit GCI to develop refined estimates of how – from a network perspective – Alascom actually serves various customer locations and, thus, to estimate the costs (Bush/non-Bush Allocation portion of the model, CAP1101 after macro.123 at Backbone tab).
- The CAP model contains investment and expense data at each and every location where any significant piece of equipment is located across Alascom's complete network. For example, the CAP model contains investment and expense information on the earth station terminal end point located in Takotna, a microwave terminal repeater in Tea Lake and a fiber spur terminal repeater for Moose Pass. (Bush/non-Bush Allocation portion of the model, CAP1101 after macro.123 at Part 32 Account tab).
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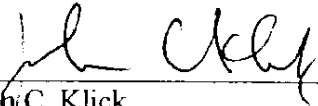
minimum, this would provide competitors with some sense of call volume to various locations, and could be used as an important input to the development of any number of potentially useful cost estimates.

- The CAP model contains information on the number of **all** customer service and operator service calls during each subject time period for each of the 33 non-Bush locations and the total for Alascom. (**Bush/non-Bush** Allocation portion of the model, **CAP1101** after macro.123 at Cust Service and Operator Service tabs).

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VERIFICATION PAGE

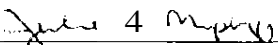
I declare under penalty of perjury that the foregoing Declaration is true and correct.



John C. Klick

Executed on: **April 4, 2003**

I declare under penalty of perjury that the foregoing Declaration is true and correct.



Julie A. Murphy D

Executed on: **April 4, 2003**